BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANICE WHALEY	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,044,622
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent and the State Self-Insurance Fund (respondent) requested review of the August 1, 2011, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on November 2, 2011. The Director appointed Joseph Seiwert to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample.[1] Melinda G. Young, of Hutchinson, Kansas, appeared for claimant. Cory V. Sheedy, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) concluded that claimant's testimony as to how her accident occurred was credible. The ALJ found that claimant sustained injuries from a series of repetitive accidents that arose out of and in the course of her employment with respondent, and claimant has suffered a 50 percent permanent partial impairment to her right lower extremity as a result of the series of repetitive accidents.

The Board has considered the record and adopted the stipulations listed in the Award.

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[1] As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Seiwert will continue to serve as Board Member Pro Tem in this case.

ISSUES

Respondent argues that claimant did not meet her burden of proof that she suffered injuries that arose out of and in the course of her employment. Respondent contends that claimant was not a credible witness as she could not provide an explanation as to why she set out different versions of her accident in the two accident reports she filled out. In the event the Board finds claimant's testimony to be credible, respondent contends the ALJ did not have jurisdiction to consider this case as having occurred as a series of accidents because the claimant's Application for Hearing set out a single date of accident of January 9, 2009.

Claimant asserts that her given reason for the completion of the two accident reports is logical and the ALJ found her to be a credible witness. Claimant further asserts that she alleged a repetitive injury in her Application for Hearing[2] and identified January 9, 2009, as the date of injury as it was the date she gave written notice to respondent. Claimant asks the Board to affirm the ALJ's Award in full.

The issues for the Board's review are:

(1) Did claimant sustain personal injury by accident or a series of repetitive accidents that arose out of and in the course of her employment with respondent?

(2) If claimant's injuries were the result of a series of accidents, did the ALJ have jurisdiction to award compensation based on a series of repetitive traumas if the claimant, on her Application for Hearing, alleged a single date of accident of January 9, 2009?

FINDINGS OF FACT

Claimant has been employed by Kansas State University since 1998 as a painter. Her job requires her to climb up and down ladders every day. She sometimes works on ladders all day long. She has to crawl, kneel, squat, and bend. The job entails a lot of repetitive motion.

Claimant first injured her right knee on May 10, 2004, while doing work for respondent at Hale Library. She was on her knees painting under cubicles and when she came out, her right knee twisted and popped. She reported the injury to her boss and filled out an accident report. Respondent provided claimant with medical treatment. She was found to have a torn meniscus, which was repaired by Dr. McAtee on June 14, 2004. She had physical therapy, after which she was told the knee was as good as it was going to get.

[2] Amended Application for Hearing filed May 22, 2009.

Claimant continued working for respondent. Claimant said that for two weeks before January 9, 2009, she had been working in Leasure Hall and had been climbing up and down an 8-foot ladder. She began having pain in her right knee, which became excruciating. She reported the pain to her supervisor and was told to fill out an accident report. On the accident report, which she made out on January 9, 2009, she described the accident as: "I was painting cubacles [*sic*] in Hale Library and was on my knees underneath work tables and sprained knee when I came out from underneath table."[3] She described her injury as "[s]prained right knee first accured [*sic*] 5/10/04."[4] However, she set out the date of accident as January 9, 2009. Claimant explained that she was not reporting the 2004 injury but it was that accident that caused her knee "to go crazy"[5] when she was on the ladder in January 2009.

Claimant said she was later contacted by Janice Mattingly,[6] who told her to fill out a second accident report. Claimant said Ms. Mattingly did not understand the first report. She said she explained to Ms. Mattingly that her current injury was an aggravation of the 2004 injury. When claimant filled out the second report on January 20, 2009, she set out: "This accident happened in 04 and it has been an ongoing thing since then. But it has been agervated [*sic*] by repeditive [*sic*] use climbing up and down an 8 ft. ladder."[7] She described her injury as "right knee back in 04 had torn meniscus and had surgery and it has been agervated [*sic*] by repeditive [*sic*] use climbing ladders."[8] Again she set out the date of accident as January 9, 2009.

After filling out the first accident report on January 9, 2009, claimant was sent by respondent to Mercy West for treatment. She was seen by a physician's assistant (PA), Francis Koopman, III, PA-C. Claimant testified she told PA Koopman her right knee had been bothering her lately and it was caused by repetitively going up and down a ladder. PA Koopman's report of January 9, 2009, indicates claimant told him she injured her right knee in May 2004 while painting under some desks and that lately it had been bothering her. She told PA Koopman that her work activities increased her pain. Claimant had previously been on Celebrex and Lyrica, both arthritis medications. PA Koopmen gave her

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[3] R.H. Trans., Resp. Ex. A at 2.

[4] *Id.*

[5] R.H. Trans. at 19.

[6] Claimant does not identify Ms. Mattingly other than to state she worked for "workers comp." It is presumed Ms. Mattingly works for the State Self Insurance Fund or is otherwise a person designated by respondent to accept workers compensation claims.

[7] R.H. Trans., Resp. Ex. B at 2.

[8] *Id.*

a prescription for Tramadol and gave her restrictions of no climbing ladders or frequently climbing stairs, as well as no repetitive kneeling, squatting or lifting more than 25 pounds.

PA Koopman wrote a letter to respondent on January 21, 2009, in which he indicated:

> The worsening of the degenerative changes in her knee is a natural progression of her osteoarthritis and would occur independent of her work activities. Exacerbation of knee pain will occur with activities that increase knee stress to include kneeling/squatting, climbing, and twisting. It is my opinion that causation of her knee pain to work activities should only address the exacerbations of pain, not the worsening of her knee osteoarthritis. Treatments may include physical therapy, joint injections, and anti-inflammatory medication.[9]

Claimant was referred by respondent to Dr. William Jones, an orthopedic surgeon. He first saw her on October 27, 2009, for right knee pain. Dr. Jones reviewed her past medical records, which indicated in 2004 she had sustained a tear of the medial meniscal cartilage and to a lesser extent, the articular cartilage. After that injury, claimant had a partial medial meniscectomy and a chondroplasty. Dr. Jones said claimant had cartilage damage to the knee dating back to 2004 and her job requirements were such that she had to be on her feet throughout the majority of the workday, which resulted in low level stress to the knee joint over a period of several years, ultimately destroying the remaining cartilage. Dr. Jones made a treatment recommendation that she have a total knee replacement.

Dr. Jones performed right total knee replacement for claimant on January 26, 2010, at which time he noted she had bone-on-bone arthritis. He is still providing care to claimant because of the mechanical knee and will continue to do so in the future in order to monitor the knee. Dr. Jones opined that the need for claimant's right knee replacement was a combination of her 2004 cartilage damage and the repetitive use she reported. He agreed with claimant's attorney that the repetitive use and constant use aggravated claimant's preexisting condition to the point that a total knee replacement was needed. Dr. Jones said all claimant's weight bearing day-to-day activities, including going up and down a ladder, were direct causes of her needing a knee replacement. It would not have been a single incident of going up and down a ladder one day but would have been cumulative over time.

Dr. Pedro Murati, who is board certified in physical medicine and rehabilitation and is a certified independent medical examiner, evaluated claimant on August 24, 2010, at the request of claimant's attorney. Claimant's chief complaints were numbness and some pain in her right knee. Claimant gave Dr. Murati a date of accident of May 10, 2004, and reported she was working on her knees painting when she heard a pop in her right knee. Dr. Murati reviewed claimant's medical records from the 2004 accident and noted: Claimant had been seen by Dr. McAtee on June 6, 2004, and was diagnosed with a right knee medial meniscal tear. Dr. McAtee recommended surgery, and claimant underwent a right knee partial medial

[9] P.H. Trans., Resp. Ex. A.

meniscectomy and a right knee chondroplasty on June 14, 2004. On August 26, 2005, claimant was diagnosed with medial compartment degenerative disease of the right knee by Dr. Munns. He recommended an unloader bracer and if that did not help said claimant would be a candidate for a total knee replacement. In July 2006, claimant was diagnosed with a strained knee by PA Kami Albers.

Claimant told Dr. Murati she started having a lot of popping and pain in the right knee due to repetitive climbing of ladders at work. Dr. Murati noted her medical records showed on January 9, 2009, claimant was seen by PA Koopman and was diagnosed with osteoarthrosis of her right knee. On October 27, 2009, claimant was diagnosed with post traumatic arthritis of the right knee by Dr. Jones. On January 26, 2010, claimant underwent a right total knee replacement by Dr. Jones.

After taking a history, reviewing her medical records, and examining claimant, Dr. Murati diagnosed her with post right knee partial medial meniscectomy, post right knee chondroplasty, and post right total knee arthroplasty. He opined that claimant's current diagnoses are a direct result of the work related injury that started on May 10, 2004, and continuously got worse while she was employed by respondent. Dr. Murati explained that claimant's problems would not have developed but for the 2004 injury, but the constant use of her knee at work permanently aggravated and accelerated the process. He said that after claimant's accident in 2004, it was more probable than not she would need a total knee replacement if she continued to do the activities she was performing at work.

Based on the AMA *Guides*,[10] Dr. Murati rated claimant as having a 50 percent permanent partial impairment to the right lower extremity. His only restrictions were that she work as tolerated and use common sense. He said he rated claimant's impairment from the total knee replacement and did not make an impairment rating for claimant's previous injury. He agreed with claimant's attorney that although his report references a May 10, 2004, date of accident, the impairment rating flows from the January 9, 2009, repetitive injury.

On March 5, 2009, claimant filed an Application for Hearing in which she claimed dates of accident of May 10, 2004, and January 9, 2009, while painting under a table and climbing a ladder. On May 22, 2009, claimant filed an amended Application for Hearing in which the date of accident is listed as January 9, 2009. The application indicates claimant injured her "[r]ight knee and all parts affected" while "[c]limbing up and down ladders."[11]

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[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[11] Application for Hearing filed May 22, 2009.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-508(d) and (e) state:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[12]

[12] K.S.A. 2010 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[13]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[14]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[15] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[16] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[17]

ANALYSIS

The ALJ had the opportunity to observe claimant testify in person before her on two occasions, first at the May 6, 2009, preliminary hearing and again at the April 7, 2011, regular hearing. In her Award dated August 1, 2011, the ALJ specifically noted that she found claimant's testimony credible. The Board generally gives some deference to an ALJ's findings as to credibility where the ALJ had the unique opportunity to observe the witness testify in person. After reviewing the record, the Board finds it is appropriate to give such deference in this case. The Board finds claimant's testimony credible that her

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[13] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[14] *Id.* at 278.

[15] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[16] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[17] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

work activities aggravated her knee symptoms. Furthermore, her explanation for the differences in her accident reports is logical and inherently consistent with her belief that she suffered a series of work-related aggravations to her original knee injury of May 10, 2004, up through the incident at work on January 9, 2009.

The Application for Hearing filed with the Division of Workers Compensation on March 5, 2009, which lists accident dates of "05/10/04 and 01/09/09" is consistent with the direction on the form itself which states, "give beginning and ending dates if a series." Claimant filed a second Application for Hearing on May 22, 2009, which alleged a single date of accident of January 9, 2009. Claimant argues that the single date of accident of January 9, 2009, which appears on the Application for Hearing filed May 22, 2009, is pursuant to the Kansas statute that defines a series of accidents as a single date. In fact, K.S.A. 2010 Supp. 44-508(d) does provide that one of the possible dates of accident for a series of cumulative traumas is the date upon which the employee gives written notice to the employer. In this case, claimant gave her employer a written accident report on January 9, 2009.

It has been apparent all along that claimant was alleging a series of accidents. Respondent does not argue surprise or prejudice. The ALJ was not without jurisdiction to find claimant's injury was the result of a series of traumas. The record establishes that claimant's knee injury and resulting disability arose out of and in the course of her employment with respondent.

CONCLUSION

(1) Claimant sustained personal injury by a series of accidents that arose out of and in the course of her employment with respondent.

(2) The ALJ had jurisdiction to award compensation for claimant's repetitive trauma injuries.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated August 1, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
Cory V. Sheedy, Attorney for Respondent and the State Self-Insurance Fund
Rebecca A. Sanders, Administrative Law Judge